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No. 86-1015

In the Supreme Court of the United States

OCTOBER TERM, 1986

TROXLER HOSIERY CO. AND
GERALD S. SCHAFER, TRUSTEE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly held that 11 U.S.C. 362(b)(1), which provides that the filing of a bankruptcy petition does not stay "the commencement or continuation of a criminal action or proceeding against the debtor," authorizes the government to collect a criminal contempt fine notwithstanding the debtor's filing in bankruptcy.

2. Whether two circuit judges who sat on the panel that imposed the criminal contempt fine at issue should have recused themselves from the panel that heard the appeal on the question whether Section 362(b)(1) authorizes the government to collect the fine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C4) is published at 796 F.2d 723. The opinion of the district court (Pet. App. B1-B29) is published at 41 Bankr. Rep. 457. The opinion of the bankruptcy court (Pet. App. A1-A7) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1986. A petition for rehearing was denied on September 24, 1986. The petition for a writ of certiorari was filed on December 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States commenced forfeiture proceedings against hazardous sleepwear garments possessed by petitioner Troxler Hosiery Company in 1978. A district court ordered Troxler not to release the goods in question for sale in foreign commerce, and the court of appeals affirmed that order. Troxler nevertheless sold the goods. Troxler was subsequently found to be in criminal contempt for violating an order of the Fourth Circuit. It was fined $80,000 plus costs and given 12 months from the date of judgment in August 1982 to pay the fine. Pet. App. B3-B6.

Troxler filed a reorganization petition under Chapter 11 of the Bankruptcy Code in November 1982.[1] The United States filed a proof of claim in the bankruptcy court, claiming a secured debt in the amount of $82,733.48 on account of the fine and costs. The United States also sought a declaratory judgment that the automatic stay provisions of 11 U.S.C. 362(a) did not prevent it from collecting this amount. The bankruptcy court denied the government's request (Pet. App. A6-A7).

The district court reversed (Pet. App. B1-B30). It relied on 11 U.S.C. 362(b)(1), which provides that "[t]he filing of a petition [in bankruptcy] * * * does not operate as a stay * * * under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor." The court noted that it was undisputed that the contempt proceedings against Troxler were criminal proceedings (*id.* at B12). It rejected petitioners' contention that Section 362(b)(1) permits the government to go forward with criminal proceedings but does not permit it to collect criminal fines. The court concluded that

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[1]The proceeding was converted to a liquidation proceeding under Chapter 7 in March 1984 (Pet. App. B7).

"[a]ction by the government to enforce the terms of a sentence are plainly a continuation of the entire criminal proceeding" (Pet. App. B13).

The court of appeals, in a per curiam opinion, adopted and affirmed the decision of the district court (Pet. App. C1-C4). Petitioners sought rehearing, challenging among other things the impartiality of two of the judges on the panel on the ground that those judges had sat on the panel that imposed the criminal contempt judgment (Pet. 12). Petitioners' request for rehearing was denied (Pet. App. D1-D2).

ARGUMENT

1. The court of appeals' decision that criminal proceedings are not stayed by the filing of a bankruptcy petition is correct. Petitioners do not allege a conflict among the circuits on that issue, and no conflict in fact exists. Accordingly, further review is unwarranted.

Subject to certain exceptions, 11 U.S.C. 362(a) stays claims against the debtor in bankruptcy proceedings.[2] Petitioners do not contest that the government may pursue criminal prosecutions against debtors, including prosecutions for criminal contempt, despite Section 362(a). Petitioners also seem to agree (see Pet. App. B13-B14) that, if a criminal prosecution produces a conviction, the government may enforce the terms of the sentence despite Section 362(a), provided that the sentence takes the form of a prison

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[2]Section 362(a)(1) stays "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." Section 362(a)(2) stays "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case."

term. However, petitioners assert that Section 362(a) stays the government's efforts to enforce the terms of a sentence for criminal contempt where the sentence takes the form of a fine.

But as the district court, affirmed by the court of appeals, concluded, 11 U.S.C. 362(b)(1) unambiguously excepts from the stay provision any "criminal action or proceeding," and the collection of a criminal fine is clearly part of a criminal action. As the district court stated (Pet. App. B12), "[s]entencing of a criminal defendant, whether it be imprisonment or imposition of a fine, fixes and declares the legal consequences of predetermined guilt." A criminal sentence "would be meaningless" if the government lacked power to enforce it, and actions by the government to enforce the terms of a sentence thus "are plainly a continuation of the entire criminal proceeding" (*id.* at B13).

If Congress had meant to provide that the government could go forward with criminal prosecutions against debtors in bankruptcy, but could not collect criminal penalties from them, it could easily have drafted the statute to accomplish that result. Congress could have provided in Section 362(b)(1) that Section 362(a)(1), which stays the commencement or continuation of actions, does not apply in criminal cases, but that Section 362(a)(2), which stays enforcement of judgments, does apply in criminal cases.[3] But Congress did not draft the statute in that fashion. Instead, it provided in Section 362(b)(1) that a debtor's filing in bankruptcy does not operate as a stay, *"under subsection a of this section*, of the commencement or continuation of a criminal action or proceeding" (emphasis

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[3]In other subsections of Section 362(b), Congress provided that exceptions to the stay provisions are applicable to certain subsections of Section 362(a) but not to others (see Section 362(b)(4) and (5)).

added). Congress thus evidenced its intent that *none* of the stay provisions of Section 362(a)—neither those applying to the commencement of actions nor those applying to the enforcement of judgments—apply in criminal cases. Accordingly, it is clear that Congress meant to permit criminal actions, including actions to enforce criminal penalties, to proceed despite the stay provisions of Section 362(a).

Petitioners also contend that while Section 362(b)(1) may authorize the commencement or continuation of a criminal action "against the debtor" despite the stay provisions of Section 362(a), it "does not apply to actions taken against 'property of the estate' " (Pet. 21). Section 362(b)(1), of course, does speak of a criminal action or proceeding "against the debtor," since criminal actions are typically commenced against persons rather than against property. As the district court concluded, however, this language "is broad enough to include enforcement of a judgment through pecuniary collection means" from the debtor *or* his property, since enforcement of the sentence is the final step in a criminal action against the debtor himself (Pet. App. B14). As noted above, Section 362(a)(2) generally does prevent "the enforcement, against the debtor *or against property of the estate*, of a judgment obtained before the commencement" of bankruptcy; if Congress had wished to foreclose the enforcement of criminal fines against property of the estate, it could easily have drafted the Section 362(b)(1) exception accordingly. As we have explained, however, Congress did not do so, but rather provided that *none* of the stays described in Section 362(a) is applicable to criminal proceedings.[4]

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[4]The cases cited by petitioners (Pet. 22) are not to the contrary. In neither *In re Nashville White Trucks, Inc.*, 731 F.2d 376 (6th Cir. 1984), nor *Matter of Gibbs*, 9 Bankr. Rep. 758 (Bankr. D. Conn. 1981), did the court mention Section 362(b)(1), since those cases did not involve criminal proceedings. In *In re Ryan*, 15 Bankr. Rep. 514, 518-519 (Bankr. D. Md. 1981), the court held that Section 362(b)(1) did not apply, but it did so because it concluded that the forfeiture proceeding at issue was not a criminal proceeding.

Petitioners assert that the result reached by the courts below conflicts with the Bankruptcy Code by giving the government a super-priority position compared to other creditors, contrary to the statutory priority scheme (Pet. 22-23). This assertion is incorrect, since Congress plainly provided in Section 362(b)(1) that the government may enforce criminal sentences despite the automatic stay provisions, thus indicating that the government need not file claims like other creditors (and be subject to the priority rules) in order to collect criminal fines. The district court recognized that its holding placed the government in a superior position to Troxler's unsecured creditors, but concluded that "[a] sovereign's interest in protecting its citizens through the criminal law is fundamentally different from private financial concerns and for that reason must take precedence" (Pet. App. B24-B25). That holding is congruent with this Court's recent holding in *Kelly* v. *Robinson*, No. 85-1033 (Nov. 12, 1986), that restitution obligations imposed as part of a criminal sentence are not dischargeable in bankruptcy.

2. Petitioners' other contention, that the two circuit judges who sat on the panel that imposed the criminal contempt fine should have recused themselves from hearing the appeal on the stay question, is plainly without merit. Federal law provides for disqualification "in any proceeding in which [a judge's] impartiality might reasonably be questioned." 28 U.S.C. 455(a). But Section 455(a) does not require disqualification merely because a judge has been involved in prior judicial proceedings involving the same matter or party. See *United States* v. *Studley*, 783 F.2d 934, 939 (9th Cir. 1986) ("a judge's prior adverse ruling is not sufficient cause for recusal"). It is well established that the prejudice to which Section 455(a) is addressed is bias stemming from an "extra-judicial source." *In re Manoa Finance Co.*, 781 F.2d 1370, 1373 (9th Cir. 1986) (citing cases). There

is no allegation of extra-judicial prejudice here. Rather, the source of the prejudice hypothesized by petitioners is the judges' prior participation in *judicial* proceedings involving Troxler. Moreover, the appeal on the bankruptcy stay issue presented a question of statutory construction wholly unrelated to the propriety of the criminal contempt judgment. There is thus no reason to think that the judges who decided the bankruptcy law issue were influenced in any way by their prior decision.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]It apparently did not occur to petitioners until after the court had rendered its decision that the judges considering the bankruptcy question should have disqualified themselves, since petitioners raised the disqualification issue for the first time in their rehearing petition. Even if there were merit to petitioners' claim that the judges should have recused themselves, petitioners should have raised their objection earlier and should be deemed to have waived it by not raising it in a timely fashion. Allowing them to raise the objection after the panel issued its decision would give them two chances at obtaining reversal by the court of appeals and encourage other litigants to wait before raising claims under Section 455(a).